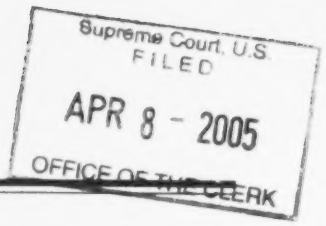
Case No. 04-1196



IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. KELLEY,

Petitioner,

v.

SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should exercise certiorari jurisdiction to review a fact-intensive decision by the Eleventh Circuit Court of Appeals, reversing the granting of federal habeas corpus relief, where the decision does not conflict with any other court opinion or address any unsettled question of federal constitutional law?

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STATEMENT OF THE CASE

The Statement of the Case included at pages 2-13 of the Petition is misleading and argumentative. Although Respondent acknowledges its obligation to correct any perceived misstatement of fact or law in the Petition, many errors are insignificant and unrelated to the question of certiorari; therefore, Respondent will identify the more troubling misstatements, but will otherwise rely on the facts as found and extensively related by the Eleventh Circuit opinion rendered below.[1]

Respondent disagrees with Petitioner's assertion that the Court of Appeals reversed the grant of habeas relief, "despite substantial evidence that the convicted defendant was entirely the wrong man" (Petition, p. 2). Respondent also disagrees with the comment that the Eleventh Circuit "broke ranks" with other circuit courts in the application of Brady v. Maryland, 373 U.S. 83 (1963), to the facts of this case (Petition, p. 3), as well as the legal analysis which follows. Respondent disagrees with the statement that, "What Brady and its progeny demand in these latter circumstances is the subject of disagreement among the circuits," and cannot understand why an argument that the circuit courts are in conflict over applying Brady is even discussed in the "Statement of the Case" section, which is typically offered to summarize the factual and procedural history of the actual case in controversy rather than provide legal argument. This argument is particularly out of place in this petition, as the claim of a circuit split was never even suggested to the Eleventh Circuit and can in no way be

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[1]The Eleventh Circuit, for the most part, reincorporated the factual findings which had been made in state court following the postconviction evidentiary hearing but which were disregarded by the district judge in granting habeas relief.

considered to be part of the history of this case.

The facts underlying Petitioner Kelley's murder conviction and resultant sentence of death are outlined in the Florida Supreme Court opinion in Kelley's direct appeal, Kelley v. State, 486 So.2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986):

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).
>
> At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken

only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

486 So.2d at 579-580.

Although the facts of the crime itself are not complicated, the procedural history is considerable and fact-intensive. As noted, the State initially prosecuted John Sweet for Maxcy's murder. According to the Petition, Sweet named two hitmen in his trial, and the State had named hitmen as well, but all of these individuals were deceased by the time Sweet agreed to provide information about the murder years later (Petition, p. 7). In fact, Sweet testified at his trials that he

had nothing to do with the murder; he did not identify any actual hitmen. Furthermore, the State had identified William Kelley as being one of the killers, and presented testimony to establish Kelley's participation in the murder at that time.

Specifically, at Sweet's trial in 1968, the State presented evidence that two men from Boston, William Kelley and Andrew Von Etter, had killed Maxcy. Testimony placed Kelley and Von Etter together in Daytona in October, 1966. Two witnesses, Kay Meyer [aka Kaye Carter] and Kelley's wife, Jeanne Kelley [aka Jennie Adams] identified Kelley as the man with Von Etter in Daytona, and testified that Kelley and Von Etter went off together during the day on October 3, 1966, returning about 8:30 that evening.

Sweet returned to Massachusetts after his successful appeal. In 1981, he approached authorities regarding criminal activity taking place in that state. Sweet was involved in a number of criminal activities, including gambling, drug trafficking, and prostitution. The Massachusetts authorities agreed to arrange a deal for protection in return for information. Sweet was asked whether he knew about any murders, and answered "Just the one in Florida," and identified Kelley as one of the killers hired to murder Maxcy. The FBI and Florida prosecutors were notified, and Sweet ultimately secured separate immunity agreements from Massachusetts and Florida authorities for a number of different crimes.

After securing Sweet's cooperation, Florida officials obtained an indictment against Kelley for first degree murder on Dec. 16, 1981. At that time, Kelley was "on the run" from the law and sought as a fugitive. Kelley was apprehended in Tampa, Florida, on June 16, 1983. Numerous pretrial motions were filed and litigated, discovery was pursued, and potential defense witnesses were identified. Kelley was initially tried in January, 1984, but the jury was unable to agree on a verdict, and a mistrial was declared.

Kelley's retrial occurred in March, 1984. The principal witness against Kelley was John Sweet, who identified Kelley as one of two men that he hired to kill Maxcy. According to Sweet, the men stayed at a hotel in Daytona, and met him at a shopping center in Sebring. Sweet drove the men to Maxcy's home in their car and dropped them off, telling them the front door was unlocked and Maxcy would be home shortly. Sweet observed that Kelley was carrying a satchel, which he opened to show Sweet several knives and guns, and that Kelley was wearing a glove. He left their car in a shopping center parking lot, picked up his own car, and drove around for awhile until he saw Maxcy's car parked at the shopping center.

Kelley's theory of defense was that Sweet was lying. To that end, as noted in the Florida Supreme Court opinion, Sweet was subjected to "rigorous cross-examination ... as to his extensive immunity." Kelley, 486 So.2d at 580. On direct examination, Sweet acknowledged having secured immunity in Massachusetts for hijacking and loan sharking, among other things. Sweet also testified that he had been given immunity in Florida for Maxcy's murder and for perjury he committed in testifying in his own trials and denying his complicity. He admitted that he had testified at both of his trials, and that he had lied repeatedly, many times, every time he was asked about knowing Kelley or Von Etter or anything about the Maxcy murder.

On cross examination, the defense elicited Sweet's admissions to having received immunity for everything he talked about, including first degree murder and perjury in Florida, and loan sharking, breaking and entering, hijacking, prostitution, larceny, narcotics violations, bribery, making false police reports, arson, bookmaking, and ownership of counterfeit plates in Massachusetts. When Sweet could not recall details of the offenses or particular immunity deals, defense counsel used 1) transcripts of Sweet's testimony before a Massachusetts

grand jury on March 18, 1981, in the Kodak theft case; 2) Sweet's testimony in a 1982 Massachusetts trial of a defendant Evans; and 3) a letter from Massachusetts prosecutor Kane revealing immunity promises that had been made to Sweet, to remind Sweet of the details. Sweet admitted that Florida officials had traveled to Massachusetts to meet with him and his attorney; that he had seven cases of immunity in Massachusetts, but not all of the prosecutor's promises were part of his formal immunity; that one incident of prostitution involved a fourteen year old girl; that he had been married for 49 years and had children and grandchildren, but lived in the federal witness protection program with his 24-year-old friend, Lisa Miller. Sweet acknowledged over and over that he had lied at his prior trials and when he denied that he knew Kelley; he had lied under oath so many times that he couldn't guess. He was impeached with his testimony from Kelley's first trial, and denied that he ever confessed his involvement to Abe Namia.

Kelley claims that, "Apart from Sweet's testimony that Kelley was the murderer, the only arguably significant evidence of Kelley's involvement," was a motel registration showing a "William Kelley" had registered there at the relevant time (Petition, p. 8). While the Respondent acknowledges that Sweet was a key witness, there was other incriminating testimony related. Specifically, Kaye Carter [Meyer] testified at Kelley's trial about meeting Kelley, Kelley's wife, and the Von Etter family in Daytona in October, 1966. She noted that Kelley and Von Etter were gone together during the day of October 3, arriving back in Daytona later that evening.

Testimony was also presented corroborating Sweet's testimony as to the time and circumstances of Maxcy's murder; bank records and telephone calls connecting Sweet with Maxcy's estate and with Walter Bennett and Andrew Von Etter; hotel and car rental records putting Sweet in Daytona at the same time as Donald Evans and Von Etter; and hotel records

showing that a "Mr. and Mrs. William Kelley," with a Dorchester, Massachusetts address and driving a Chevrolet with a Massachusetts tag number G-990077 were registered at the Daytona Inn at the time of the murder. Former Massachusetts state police officer John Kulik testified that he knew Kelley to frequent Walter Bennett's establishments and to drive Jennie Adams' car, which was the one registered at the Daytona Inn motel. Other testimony included FBI Special Agent Ross Davis, who noted incriminating statements Kelley made upon his arrest in Tampa in 1984, and private investigator Abe Namia, who testified that he had worked with John Sweet's trial defense team and that Sweet had made prior consistent statements implicating Kelley in the late 1960's. There was testimony that Kelley's appearance had changed in the seventeen years between the time of the murder and the time of his trial. A deputy testified that fingerprints were lifted from the crime scene and from Maxcy's car, but that, to his knowledge, the prints were never identified.

In his closing argument, defense counsel Kunstler described Sweet as an evil man that had received immunity for numerous serious offenses. He tied all of Sweet's benefits squarely back to Kelley: "He had to give them somebody, and this is the man he had to give. This is the only one alive that he knew. He had to give them Mr. Kelley to get all this." The prosecutor's closing argument acknowledged that Sweet had received immunity, but challenged defense counsel's assertion that Sweet "had to give them Kelley," stating that "John Sweet did not have to give the police Kelley in order to get immunity. John Sweet got immunity from Massachusetts on a long list of things. It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases." Defense counsel Edmund had the final closing argument, and reminded jurors that Sweet "walked away free," with immunity from everything except the perjury he had committed against Kelley. Edmund listed the numerous

offenses, effectively pairing them up with the Ten Commandments.

Kelley's direct appeal and request for certiorari review were denied. Kelley v. State, 486 So.2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986). State postconviction proceedings were initiated by the filing a motion to vacate on November 20, 1987. The Honorable Randolph E. Bentley, Circuit Court Judge, granted an evidentiary hearing which was conducted July 18-19, 1988. The witnesses Kelley presented at that hearing were: defense trial attorney William Kunstler; Florida attorneys Donald Ferguson and Barry Haight and Massachusetts attorney Robert Jubinville (testifying to Kelley's contacts with them in 1981 or 1982, concerned whether an indictment had been filed against him); Boston newspaper reporter James Harrington; Massachusetts private investigator and former police detective William Stuart; FDLE investigator Roma Trulock; and Mark Nezer, a private investigator that worked for Kelley's postconviction attorneys. The State presented FDLE Special Agent Joseph Mitchell and defense trial co-counsel Jack Edmund.

Following the evidentiary hearing, Judge Bentley denied relief and, on appeal, the Florida Supreme Court affirmed his ruling in all respects. Kelley v. State, 569 So.2d 754 (Fla. 1990). Judge Bentley's factual findings were adopted and incorporated into the appellate opinion. Judge Bentley expressly found that Sweet's Massachusetts immunity was not contingent upon providing information incriminating Kelley, and that there was no support for the suggestion that Kelley had read the Boston news articles about his indictment in 1981. Kelley, 569 So.2d at 758-760. He concluded:

> The fingerprint report, the transcript of John Sweet's first trial, and the original 1967 police report were the only items of evidence which the defense did not

> possess or have access to. The results of the fingerprint report were known to the defense and utilized at trial. The alleged items of exculpatory testimony presented at Sweet's first trial were either known to defense counsel, admitted by Sweet at the defendant's trial, or irrelevant as not involving Sweet, and Kaye Carter's questionable identification of the defendant in 1967 was immaterial.
>
> ...
>
> But most important, this court, as trial court, observed the actions and conduct of both defense attorneys in the course of the two trials, and found their representation of the defendant to be capable and effective. The court does recognize that Mr. Edmund and Mr. Kunstler disagreed at the hearing in regard to which attorney acted as lead counsel at trial and other matters. Mr. Kunstler has strong feelings against the death penalty. Apparently those feelings have affected his perception of the attorneys' actions at the trial. However, he conveniently finds the greatest fault to be with co-counsel, not himself. He remained silent at trial and for four years thereafter. A large part of his testimony is not credible. Based on demeanor, and the court's own observations in the courtroom, the court accepts Mr. Edmund's version insofar as any conflict exists.

Kelley, 569 So.2d at 758, 761.

Following the state court rejection of his claims, Kelley filed a petition for writ of habeas corpus in the United States District Court, Southern District of Florida. The petition was filed in October, 1992, and on August 31, 2000, the Honorable Norman Roettger denied three claims. Thereafter, Judge

Roettger granted an evidentiary hearing on the remaining three claims, which commenced in Boston, Massachusetts, in April, 2001.

The district court issued an Order granting habeas relief pursuant to Brady on September 19, 2001, followed by an Order of December 30, 2001, finding that Kelley's trial attorneys provided ineffective assistance of counsel by relying on Harvey Brower for the pretrial investigation. On appeal, the Eleventh Circuit rendered an extensive opinion reversing the grant of habeas relief. Kelley v. Secretary of the Department of Corrections, 377 F. 3d 1317 (11th Cir. 2004). The instant Petition seeks review of that opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

Rule 10 of this Court's rules governs the appropriate considerations in determining the propriety of certiorari review:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner Kelley has offered two questions relating to the opinion entered by the Eleventh Circuit below. First, he asserts that his petition should be granted due to an alleged conflict among United States Courts of Appeals regarding the proper scope of "materiality" for purposes of assessing disclosure requirements under Brady v. Maryland, 373 U.S. 83 (1963), when the undisclosed information relates to the credibility of a key witness that was impeached at trial. See generally, Banks v. Dretke, 540 U.S. 668 (2004); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985). His second question claims that the Eleventh Circuit did not properly apply this Court's exhaustion doctrine or Sixth Amendment precedent in reversing the district court's finding of ineffective assistance of counsel. As will be seen, these issues are unworthy of this Court's certiorari jurisdiction for a number of reasons, and this Court should deny the petition for review.

QUESTION ONE

1. Certiorari review should be denied because there is no conflict between the circuit courts in applying the materiality element of Brady.

Kelley initially asserts that this case meets this Court's standards for extraordinary review due to an alleged conflict between the circuit courts in the application of this Court's directives on assessing the materiality of impeachment information withheld by the prosecution prior to a criminal trial. However, a review of the relevant caselaw establishes that no such conflict exists. Kelley has merely established that different cases present different facts which compel different results. Contrary to Kelley's claim for certiorari, the decision below, reversing the granting of federal habeas relief, was fully consistent with this Court's precedents and all applicable federal law.

Kelley asserts that in this case the Eleventh Circuit applied Brady in a manner inconsistent with precedent from the Ninth and District of Columbia circuits. Specifically, Kelley contends that the Eleventh Circuit contradicted "the rule" imposed by the Ninth and District of Columbia circuits in assessing the materiality element of a Brady claim involving impeachment information related to a key witness. He attempts to create "conflict" among circuit courts by contrasting the language used below with that of other circuit decisions reaching different results in different cases.

Kelley claims that the District of Columbia circuit adopted a bright-line rule in United States v. Smith, 77 F.3d 511, 515 (D.C. Cir. 1996),[2] when that court rejected the state's

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[2]According to the petition, Smith repudiated a contrary rule from United States v. Derr, 990 F.2d 1330, 1336 (D.C. Cir.

argument that the Brady information was immaterial because it would only provide cumulative impeachment evidence. The relevant language, "the fact that other impeachment evidence was available to defense counsel does not render additional impeachment evidence immaterial," is offered as a quote from United States v. O'Conner, 64 F.3d 355, 359 (8th Cir. 1995),[3] citing Napue v. Illinois, 360 U.S. 264, 270 (1959)). The court then instructs that the proper inquiry looks "not to the ways defense counsel was able to impeach ..., but to the ways in which the witness' testimony was allowed to stand unchallenged," to determine materiality in accordance with Bagley.

According to the petition, this analysis is contrary to the Eleventh Circuit's interpretation of Bagley in the opinion rendered below. Kelley asserts that a conflicting rule is applied in the Eleventh Circuit, joined by the First, Fifth, and Seventh Circuits, which have all rejected Brady claims upon finding that the withheld information was immaterial where it provided only cumulative impeachment evidence. Kelley traces the beginning of this alleged rule to United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996), which held that, "suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."

1993). The Smith court addressed Derr in a footnote, but did not characterize its holding as overruling any prior rule. Rather, the court distinguished Derr factually, as well as noting that decision predated Kyles v. Whitley, 514 U.S. 419 (1995). See Smith, 77 F.3d at 515, n.2.

[3]Petitioner does not cite O'Conner or allege that the Eighth Circuit is involved in the purported split among the circuits.

The cases cited by Kelley acknowledge the same standard cited below, usually quoted directly as set forth in Bagley, and merely apply that standard to the particular facts present. None of the cases purport to establish a bright-line rule one way or the other, as suggested by Kelley. Smith itself demonstrates that the alleged rule is not a new rule at all, but relates back to the observation in Napue that the taint of false testimony is not removed by the fact that the witness testifying falsely was impeached.[4] Similarly, a reading of Benn v. Lambert, 283 F.3d 1040, 1058 (9th Cir. 2002), establishes that case was decided after a careful review of the record, rather than a dispositive determination that a key witness had already had his credibility called into question. The court in Benn even acknowledged the proposition that undisclosed impeachment evidence is immaterial and cumulative when the witness is already sufficiently impeached, citing Ninth Circuit cases rejecting relief under such circumstances. And following Benn, the Ninth Circuit has continued to deny habeas relief when undisclosed impeachment evidence does not undermine confidence in the trial. See United States v. Rosen, 94 Fed. Appx. 567, 572 (9th Cir. 2004), vacated, remanded in light of United States v. Booker, 543 U.S. __, 125 S. Ct. 738 (2005), 125 S. Ct. 1041 (2005).

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[4]It is noteworthy that Kelley's asserted rule has its genesis in Napue, which, like Giglio v. United States, 405 U.S. 150 (1972) and many of the cases in the petition, involved a due process violation premised on the prosecutor's knowing failure to correct false testimony rather than a failure to disclose impeachment evidence to the defense. The Napue/Giglio materiality standard is different from Brady, and the defense has never asserted in this case that Sweet's testimony was false or misleading, let alone that the prosecution knew and failed to correct such testimony.

Benn is easily factually distinguished from the instant case. The court there concluded, "[t]he undisclosed benefits ... added significantly to the benefits that were disclosed," but, in the instant case, the revelation of the FDLE memorandum adds nothing significant to what the jury heard at trial. It is not surprising that the court would reach a contrary conclusion on materiality. The degree of impeachment at trial will be a significant factor in determining whether, and to what extent, additional impeachment evidence will impact the jury and affect the credibility of the witness. The immateriality in the instant case is not premised merely on the fact that John Sweet was impeached at trial; it is that the trial impeachment was so substantial, and the withheld material provided so little, if any, additional impeachment value, that the jury's verdict remains worthy of confidence. The degree of trial impeachment, and not just the fact of attempted impeachment, is a key distinction setting this case apart from Benn. Furthermore, this same critical distinction sets this apart from Banks, Smith, and other cases that Kelley claims apply a different rule.

Whether or not impeachment evidence is material for Brady purposes depends on the nature of the evidence itself, and necessarily considers the extent to which the witness was impeached, and the nature of that impeachment. The facts determinative of the ultimate conclusion on materiality are obviously going to be different in every case, which is one reason a bright-line rule is not a prudent answer to the materiality question. As is appropriate, all courts currently perform a fact-intensive review of the nature and quality of the impeachment evidence in light of the trial record, including the extent to which the witness was previously impeached, the extent the witness' testimony is corroborated by other evidence, and the strength of the case against the defendant independent of the witness' testimony.

Moreover, the suggestion of the existence of a hard and

fast rule is soundly refuted by other cases from the various circuits which hold contrary to the "rule" Kelley would assign their analyses. That is, the Ninth and District of Columbia circuits have, in some cases, found immateriality based on withheld cumulative impeachment evidence, just as the other circuits have granted Brady relief based on withheld impeachment evidence even where the credibility of the witness had already been called into question at trial. See Boyette v. Lefevre, 246 F.3d 76, 93 (2d Cir. 2001) (granting habeas relief, rejecting State's argument that withheld impeachment evidence was cumulative since witness was impeached); Crivens v. Roth, 172 F.3d 991, 998-999 (7th Cir. 1999) (granting habeas relief, finding withheld impeachment information could have affected credibility of key witness); United States v. Scheer, 168 F.3d 445, 458 (11th Cir. 1999) (granting habeas relief for withheld impeachment evidence on critically important witness whose credibility had already been called into question); East v. Johnson, 123 F.3d 235, 239 (5th Cir. 1997) (granting habeas relief for undisclosed impeachment information on key witness, noting critical factor was extent to which witness' testimony had been corroborated); United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999) (rejecting Brady relief based on impeaching evidence, noting question is "how effectively the evidence could have been used in cross-examination," and what effect it would have had on the jury's assessment of credibility); Ortiz v. Stewart, 149 F.3d 923, 936 (9th Cir. 1998) (undisclosed impeachment evidence is immaterial and cumulative when the witness is already sufficiently impeached); United States v. Vgeri, 51 F.3d 876, 880 (9th Cir. 1995) (same). These decisions again confirm that no "rule" is necessary or even prudential, and certainly none currently exists that is recognized as such by any court.

Thus, an objective review of relevant case law demonstrates that there is no conflict among the circuit courts

as to this issue. In fact, there are no cases recognizing the "split" in authorities suggested by Kelley. The courts do not apply different sets of rules, but caselaw reveals that the circuit courts uniformly apply this Court's directives on assessing materiality under the totality of circumstances as mandated in Brady and the line of cases interpreting materiality.

Notably, Kelley's appellate brief to the Eleventh Circuit never suggested to that Court that it should adopt a different standard, or that its caselaw on this issue was inconsistent with other circuits. In fact, Kelley did not even cite to any Ninth or District of Columbia circuit decisions anywhere in his brief. The opinion below cited to Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994), a decision cited in the State's brief and not distinguished or even mentioned in Kelley's brief. In this Court, Kelley has criticized the Eleventh Circuit for failing to recognize that, as a matter of law, undisclosed information relating to the credibility of a witness must be material if that witness was impeached at trial. Yet Kelley's brief to that court did not admonish it to do so; Kelley therein presented a fact-specific argument to support the district judge's finding of materiality. These facts reinforce the conclusion that Kelley's claim of circuit conflict is an illusory afterthought created solely to entice this Court's review of this case rather than a compelling basis for certiorari.

The Eleventh Circuit opinion below acknowledged the proper materiality standard, quoting Bagley, and extensively analyzed the possible impact of the withheld information on Kelley's prosecution. The court then concluded:

> Whether or not the five items the district court identified should have been disclosed to defense counsel, their effect taken individually and cumulatively could not have been legally significant to the outcome of Kelley's trial. As explained at length

> above, defense counsel effectively capitalized--in one way or another--on every potentially valuable argument the five items support, even though the items themselves were unavailable to counsel at the time of trial. It follows in this instance that the pretrial disclosure of the items would not have created a "reasonable probability that . . . the result of the proceeding would have been different." *Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.* Thus, although the State ultimately prevailed in a factually challenging case, Kelley's due process rights were not offended.

Kelley, 377 F.3d at 1369 (Pet. App. 99a). Kelley has failed to demonstrate that this conclusion warrants any further consideration by this Court.

Thus, this issue involves neither conflict nor unsettled federal law. Although the failure to meet any of the Rule 10 considerations is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987).

Because Kelley has failed to demonstrate conflict among courts, an unsettled question of federal law, or any other reasonable basis for review, his request for certiorari review of the rejection of his Brady claim must be denied.

2. Certiorari review should be denied because the Eleventh Circuit correctly resolved the fact-intensive issue.

In order to decide the specific issue of whether Kelley is entitled to a new trial, it would be necessary for this Court to engage in a fact-intensive review of the evidence in this case.

Such is inappropriate for certiorari review.

The law is well-settled that this Court does not grant a certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984). Nor does this Court sit to correct alleged mistakes committed by other tribunals. Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). Rather, this Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). The instant case is a particularly poor vehicle for certiorari, since the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) has changed the standard for habeas review of constitutional claims on state court judgments; federal courts are no longer to conduct their own Brady analyses, but must defer to reasonable legal holdings by the state courts. The reduction in the scope of review under AEDPA narrows any impact this case could have, and further diminishes any arguable basis for certiorari.

An extensive factual review would only confirm that relief has been properly denied in this case. The district court held that two documents, a "Contract for Immunity," between John Sweet and the State of Massachusetts dated March 13, 1981, and a memorandum by Florida Agent Joe Mitchell describing meetings between John Sweet, Sweet's attorney, and Florida and Massachusetts officials, both should have been disclosed to the defense prior to trial. Although defense attorneys Kunstler and Edmund testified in state court that they had not seen these particular documents prior to trial, the trial record demonstrates that the defense had extensive information

about Sweet's immunity deals. The state courts found:

> The fact that John Sweet received immunity in both Florida and Massachusetts was well known by defense counsel. Sweet was extensively cross-examined by Mr. Edmund concerning the crimes for which he received immunity in Massachusetts. The court finds no evidence to support the inference that Sweet's Massachusetts immunity was contingent upon his testimony in the defendant's Florida trial.
>
> ...
>
> The fingerprint report, the transcript of John Sweet's first trial, and the original 1967 police report were the only items of evidence which the defense did not possess or have access to.

Kelley, 569 So.2d at 758. The finding that Sweet's immunity was fully disclosed is a finding of historical fact, and the district court committed clear error in disregarding the state courts and determining that Sweet's immunity had been suppressed. Purkett v. Elem, 514 U.S. 765, 769 (1995) (state court findings may be set aside, absent procedural error, only if unsupported).

Moreover, as the court below found and Kelley did not contest, the Massachusetts Order of Immunity "cannot constitute Brady material because there is no indication in the record that the State possessed the order, nor is there any indication that the order was more accessible to the State than it was to Kelley's defense team;" in fact, the court below found this Order was a public document equally accessible to the defense. Kelley, 377 F.3d at 1356, n. 39 (Pet. App. 71a). In addition, Kelley's claim of materiality was premised on his assertion that the timing of the Massachusetts Order, in conjunction with the undisclosed FDLE report, established that Sweet's Massachusetts immunity was contingent on Sweet

providing information about Kelley's involvement in Maxcy's murder. The defense had argued such contingency to the jury, which the State disputed, and this factual contest has continued ever since. The state trial judge reviewed the documents and heard testimony about Sweet's immunity in a full and fair postconviction evidentiary hearing in state court, concluding thereafter that the Massachusetts immunity was independent of Sweet's cooperation with Florida authorities. The federal district court ignored this conclusion, and, without identifying any deficiency in the state fact-finding procedure or even acknowledging that the finding had been made, reviewed the documents, entertained testimony, and concluded Sweet would not have received immunity in Massachusetts without cooperating with Florida authorities. The Eleventh Circuit extensively reviewed the documents and explained why the state court conclusion was supported by the evidence, finding it "obvious" that the district court judge had confused the Massachusetts immunity with Sweet's desire for immunity in Florida, and determining the evidence, "leads inexorably to the fact that Pickard [the prosecutor] told the truth" in his closing argument to the jury. Kelley, 377 F.3d at 1359 (Pet. App. 77a).

Kelley asserts that the Eleventh Circuit rejected his Brady claim by holding "that the jury was not 'entitled to know of'" the withheld impeachment evidence (Petition, p. 14-15). In fact, what the Eleventh Circuit determined was that the jury already knew all necessary information about Sweet's Massachusetts immunity. Additionally, the withheld FDLE report does not even mention the Massachusetts immunity. A conclusion of immateriality is clearly compelled on these facts.

Kelley also argues that the Eleventh Circuit's reversal of the district court finding on this particular issue provides an independent basis for summary reversal of the opinion below, claiming the Eleventh Circuit violated Amadeo v. Zant, 486 U.S. 214 (1988), by improperly substituting its appellate

fact-finding rather than deferring to the district court (Petition, p. 22-23). Kelley's claim is not well taken. In Amadeo, there were no relevant state court factual findings, and after the Eleventh Circuit had remanded the case for a federal evidentiary hearing, it improperly rejected the facts as found by the district judge. The instant case is clearly distinguishable as the district judge should have acknowledged the relevant state court factual finding, and had no basis for accepting and considering additional evidence before concluding contrary, to all of the evidence, that Brady relief was warranted.

Kelley has no viable Brady claim, as there was no significant information which the jury did not hear at trial. Because the Eleventh Circuit properly resolved this fact-intensive claim, certiorari review must be denied.

3. Certiorari review should be denied because Kelley seeks application of a new rule of constitutional law in a collateral proceeding.

Finally, this Court should decline to exercise its certiorari jurisdiction because Kelley is seeking a change in law which would not be subject to retroactive application to his conviction and sentence, which have been final since 1986. In Teague v. Lane, 489 U.S. 288, 316 (1989), this Court announced the principle that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure" unless the rule would meet the standards for retroactivity adopted in Teague.

In this case, Kelley's attempt to have this Court adopt a bright-line rule for assessing the materiality of withheld impeachment information seeks a clear break with the totality of the circumstances review currently mandated by this Court's precedents. This break constitutes such a significant change in the due process analysis that it amounts to a new rule under

Teague; i.e., it is not dictated by this Court's current line of Brady decisions. Teague, 489 U.S. at 301. The proposed rule cannot meet either exception for retroactivity. It does not place private conduct beyond the power of lawmakers' ability to proscribe, and is not a bedrock procedure, implicit in the concept of ordered liberty. Teague, 489 U.S. at 310-311.

Kelley is not asking this Court to simply reinforce and apply the materiality standard as it has been developed in the Brady line of cases; he is seeking rejection of Brady's directive to reach a conclusion on materiality based on the totality of the circumstances. Currently, a materiality analysis requires a court to evaluate the undisclosed evidence "in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112 (1976). A defendant must show that the undisclosed information, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict;" and that "a reasonable probability of a different result" exists if the information had been disclosed. Kyles, 514 U.S. at 434-435. The pivotal question for a reviewing court is whether its confidence in the jury verdict has been undermined. Bagley, 473 U.S. at 678. Kelley would abandon this standard and require a rule that information is material as a matter of law if it provides impeachment evidence relating to a key witness whose credibility was called into question at trial. Because this would amount to a new rule of constitutional law, it is not available in a habeas proceeding, and certiorari must be denied.

QUESTION TWO

1. Certiorari should be denied because the Eleventh Circuit properly determined Kelley's claim of ineffective assistance of counsel had not been exhausted in state court.

Petitioner Kelley also asserts that certiorari review is compelled by the Eleventh Circuit's reversal of the district court's finding that a new trial was warranted due to ineffective assistance of trial counsel. According to the petition, the Eleventh Circuit circumvented this Court's decisions in Kimmelman v. Morrison, 477 U.S. 365 (1986), and Wiggins v. Smith, 539 U.S. 510 (2003), because Kelley's trial attorneys allegedly did nothing at all to prepare for trial,[5] yet the Eleventh Circuit denied that a Sixth Amendment violation occurred. However, a review of the history of this claim establishes that the Eleventh Circuit ruling below is entirely consistent with this Court's precedents, and no basis for certiorari review has been demonstrated.

Kelley focuses his argument initially on an attorney's constitutional obligation to meaningfully investigate and prepare for trial. He relies on Kimmelman and Wiggins to assert that his attorneys' performance fell below the standard of

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[5]Kelley repeatedly suggests that his assertion of trial counsel's failure to conduct *any* pretrial investigation whatsoever is unrebutted, undisputed, and conceded (Petition, p. 25-26). It is not. In fact, the record reflects that Kelley was represented by several attorneys and a reasonable pretrial investigation took place. The Eleventh Circuit noted the "oddity" of the district court's criticism of trial counsel, given the record of pretrial motions filed in this case. Kelley, 377 F.3d at 1347, n.30 Pet. App. 53a-54a).

reasonableness, and indignantly demands that this Court summarily reverse the Eleventh Circuit for failing to uphold habeas relief on this issue.

The first difficulty with Kelley's argument is that the Eleventh Circuit did not even purport to apply Kimmelman or Wiggins in the case at hand. The stated basis for the Eleventh Circuit's rejection of Kelley's ineffective assistance claim was the holding that the specific issue upon which the district court granted relief -- counsel's failure to prepare generally and reliance on Harvey Brower specifically -- had not been exhausted in state court. Kelley does not offer any persuasive analysis as to how the Eleventh Circuit is mistaken in this ruling, he simply disagrees with the conclusion of the court below. Kelley believes that his presentation of a general claim of lack of preparation should be cognizable in federal court as long as the specific allegations of deficient performance in state court related to a general lack of preparation.

The Eleventh Circuit painstakingly analyzed Kelley's state and federal pleadings in order to determine whether the state courts had reasonable notice of the particular allegations of ineffective assistance of counsel on which Kelley ultimately prevailed in the district court. Kelley, 377 F.3d at 1345-1350 (Pet. App. 49a-60a). The court concluded that the claim as presented in federal court was radically different than that litigated in state court and held that the district judge should have dismissed this allegation as unexhausted. The fact that the specific deficiency upon which the district court granted relief shares a common umbrella of "lack of pretrial investigation" with other specific deficiencies which were exhausted does not demonstrate exhaustion where, as here, the deficiency upon which relief was granted was never presented to the state court. See generally, Baldwin v. Reese, 541 U.S. 27 (2004); Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992); Picard v. Connor, 404 U.S. 270 (1971); Anderson v. Harless, 459 U.S. 4, 6 (1982). No

certiorari review is compelled.

Kelley's strongest argument to protest the application of the exhaustion doctrine asserts that the State waived any defense based on lack of exhaustion by failing to assert such while the case was still in state court. Kelley does not explain why the State would offer a federal habeas defense while in state court; the problem is not that Kelley changed his claim between the state trial and appellate courts, the problem, as pointedly explained by the Eleventh Circuit, is that the claim changed between state and federal court. As the court below noted, the Respondent pled the lack of exhaustion at the first appropriate opportunity, in the initial response to the petition for writ of habeas corpus, and it was reasserted repeatedly throughout the district court proceedings. On such facts, Kelley's attempt to avoid application of the exhaustion doctrine must be rejected.

2. Certiorari should be denied because the Eleventh Circuit properly rejected Kelley's claim of ineffective assistance of counsel based on the court's inability to find, and the district court's failure to identify, any prejudice.

Even if there were an avenue by which this Court could review the unexhausted claim of ineffective assistance upon which the district court granted relief, no reasonable basis for certiorari has been offered. By focusing on Kimmelman and Wiggins rather than Strickland v. Washington, 466 U.S. 668 (1984), it appears Kelley is most concerned about the deficient performance prong, since those decisions are concerned with counsel's performance rather than prejudice. This is curious since the court below did not discuss the reasonableness of counsel's performance, focusing rather on the fact that the district judge had failed entirely to identify any prejudice, and

noting that such prejudice would be "difficult, if not impossible" to find on the facts of this case. Kelley, 377 F.3d at 1352 (Pet. App. 64a).

Finally, the assertion of prejudice in Kelley's petition is weak and unpersuasive. Kelley claims that, had counsel investigated as constitutionally required, he would have discovered and presented two witnesses, Hobart Willis and Charles Busias, that would have convinced the jury that Kelley was innocent because the real hired killer was Steven Busias. Both witnesses testified at the federal evidentiary hearing.[6] Willis testified via videotaped deposition that sometime around 1968, Steven Busias told Willis that he had committed a murder down in Florida. Willis stated that he knew Busias was talking about the Maxcy murder because Willis had previously been solicited to commit this murder himself.

This testimony would be hearsay, and inadmissible under Florida law. Assuming the defense would have offered the testimony under the "statements against interest" exception to the hearsay rule, Florida law restricts this exception to statements which bear sufficient independent indicia of trustworthiness to be reliable. Voorhees v. State, 699 So.2d 602 (Fla. 1997); see United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992), cert. denied, 507 U.S. 971 (1993) (concluding that "a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest"). In Florida, the defendant has the burden of presenting the corroborating circumstances to demonstrate trustworthiness of the hearsay statements. Jones v. State, 678 So.2d 309, 314 (Fla. 1996), cert. denied, 519 U.S. 1152 (1997). However, Kelley has never identified a predicate which could

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[6]That these witnesses were never presented or even mentioned in state court confirms the lack of exhaustion on this issue.

be used to establish the admissibility of this testimony. According to Willis, Busias made the alleged confession in the course of a general social conversation; as Willis put it, "gangster talk - who was getting paid, who was killing who." Busias offered absolutely no details of his alleged actions, stating only that he had "taken care of that contract that [Willis] refused a few years ago." The absence of any details or corroborating circumstances to Willis' testimony would preclude its admission under Florida law. Compare, Wood v. Bartholomew, 516 U.S. 1 (1995) (reversing grant of habeas relief because Ninth Circuit misapplied materiality element in finding Brady violation based on information not admissible at trial).

The other witness to implicate Steven Busias was Charles Busias, Steven's son. According to Charles, sometime around 1966 his father took a trip to Florida, and after the trip, their financial situation improved dramatically. Charles testified that his father purchased a car and a lounge after this and had multiple stacks of hundred dollar bills in cash on hand. This testimony in no way establishes that Steve Busias killed Maxcy. In fact, Hobart Willis' testified that Busias admitted to him that he had acquired a club and taken over the establishment after killing the owner; this provides another reasonable explanation for Charles' memories. Furthermore, given the trial testimony that Von Etter's partner was only paid a total of $5,000 for the murder, and trial testimony that several different individuals from Massachusetts had come to Florida to explore Sweet's offer to pay for Maxcy's murder, there are other convincing explanations for Charles Busias' testimony. Kelley has never demonstrated how his attorneys knew or should have known about Charles Busias; even if they could have discovered him, however, given the limited value of this testimony, they cannot be deemed ineffective for failing to present it.

Against this backdrop, the Eleventh Circuit credits the testimony of Kelley's trial attorneys relating their reluctance to present evidence and lose the right to offer the final closing summation to the jury. The court also noted that the defense investigation had continued after a mistrial was declared in the first trial, and that the defense had the unique advantage of a full record of the state's case. Given all of the relevant facts, the court below was at a loss to explain how the district court could have found the prejudice necessary to grant relief on a claim of ineffective assistance of counsel. In light of the lack of prejudice, certiorari review of Kelley's Sixth Amendment claim must be denied.

To the extent the petition may be read to suggest that no prejudicial showing is necessary if a sufficient case of deficient performance under Kimmelman or Wiggins is established, it is mistaken. Wiggins confirmed rather than eliminating the element of prejudice necessary for the finding of a Sixth Amendment violation. The notion that a poor enough job of lawyering will give rise to a new trial without regard to any prejudicial effect is protected in United States v. Cronic, 466 U.S. 648 (1984), and needs no embellishment, particularly from a case where no deficient performance has reasonably been shown. In addition, if this Court were to eliminate the prejudice prong from an ineffective assistance analysis, this would create a new standard and constitute such a departure from Strickland that it would amount to a new rule of constitutional law, unavailable in the habeas context under Teague, 489 U.S. at 316, as noted previously.

With this issue, Kelley has not even attempted to show any conflict or unsettled federal law, worthy of this Court's certiorari review. He has offered no special or important reasons compelling certiorari review of his case. Accordingly, this Court must deny the instant petition.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent, Secretary for the Florida Department of Corrections, respectfully requests that this Honorable Court DENY the petition for writ of certiorari filed herein.

Respectfully submitted,

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